ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of:	)	
	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996	)	

COMMENTS OF
RHYTHMS NETCONNECTIONS INC.

Jeffrey Blumenfeld
Frank Paganelli
Rhythms NetConnections Inc.
9100 E. Mineral Circle
Englewood, CO 80112
303.476.4200
303.476.5700 fax
jeffb@@rhythms.net
fpaganelli@rhythms.net

Christy C. Kunin
Kristin L. Smith
Elizabeth Braman
Blumenfeld & Cohen–Technology Law Group
1625 Massachusetts Avenue, Suite 300
Washington, D.C. 20036
202.955.6300
202.955.6460 fax
christy@technologylaw.com
kristin@technologylaw.com
elizabeth@technologylaw.com

Dated: October 12, 2000

SUMMARY

The word "necessary" is sufficiently ambiguous to invoke *Chevron* deference by the courts, but in order to be accorded such deference, the statutory term must be interpreted reasonably by the Commission. When ascertaining the "ordinary and fair meaning" of a word susceptible of a broad range of meanings, the Commission should look to the context of the word and ensure that the reading is consistent with other statutory provisions. Further, the courts have made clear not only that a reasonable construction of the term "necessary" must impose "some limiting standard," but also that the Commission must read the statutory terms to effectuate the goals and purposes of the Act. Applying these principles of statutory construction, the Commission should rule that ILECs must permit physical collocation of equipment so long as it is "directly related to" interconnection and access to unbundled elements and an inability to collocate such equipment would interfere with a CLEC's ability to compete effectively and efficiently.

When the proposed standard is applied, multiuse equipment, and digital loop carrier line cards are equipment necessary for interconnection and access to unbundled elements and thus CLECs should be permitted to collocate this equipment on the ILEC premises. Indeed, the Commission should implement rules that expressly provide for collocation of multiuse equipment, DLC line cards, as well as ensure that CLECs can continue to collocate the equipment necessary to efficiently and effectively provide advanced services to consumers.

In order for carriers to physically collocate equipment in accordance with the statute, there are several physical collocation requirements that are necessary for interconnection and access to UNEs. Specifically, CLECs must be able to cross-connect within the central office with other carriers. Section 251(c)(6), properly interpreted, means that ILECs may not require

competitors to construct separate entrances, to segregate their equipment, or to adhere to minimum space requirements. Additionally, consistent with the statutory language and purpose, the Commission should establish the regulatory structure to allow competitors to collocate all "necessary" equipment at the remote terminals, as well as to collocate all equipment "necessary" for line sharing. Finally, to facilitate efficient implementation of these policies, the Commission should set national maximum collocation provisioning intervals to provide national consistency and uniformity.

Properly implemented, the evolution of the loop network can benefit consumers and carriers, through rapid deployment of state-of-the-art technology that holds the promise of new, innovative service offerings and improvements. To assure that the networks evolve to the benefit of the public and consistent with the statutory and regulatory policy of promoting competition, the Commission must take this opportunity to expand and reiterate ILEC obligations as the relate to changes in network architecture.

This docket properly raises several examples of the need for regulatory oversight of ILEC network architecture changes. For example, due to emerging technology much of the equipment that carriers use to assemble their networks is changing—equipment is becoming more compact and multi-functional.

The ILEC deployment of NGDLC effects one portion of the network in particular, the local loop. Competitors depend on access to the local loop to provision service over the "last mile" to the end user. Indeed, both Congress and the Commission have recognized this dependence by making the local loop, as well as its subloop portions, network elements that the ILECs must unbundle for CLECs. The Commission must reiterate ILECs' duties to fulfill these unbundling obligations even when NGDLC is deployed. The rules governing collocation must

adapt to allow the additional types of equipment that CLECs must collocate at the ILEC premises.

Specifically, the Commission should require ILECs to consider and accommodate competition in designing their networks, and thus ILECs to coordinate with CLECs in the planning, design and implementation of the network. Further, the Commission should reiterate that the Act's unbundling obligations apply as the network evolves. Thus, ILECs must unbundle all loops, regardless of the technology used in the loop. CLECs must be able to use all the features, functions and capabilities of loops served over NGDLC, and have access to the OSS systems for those loops. Likewise, the Commission should reiterate that CLECs are entitled to nondiscriminatory access to subloops in an NGDLC architecture, including the copper distribution, copper feeder and fiber feeder. Access to these subloop elements must be made available at any technically feasible point in the network. In addition, CLEC must have access to spare copper. The Commission should also reemphasize the requirement that ILECs unbundle the DSLAM on fiber fed loops when CLECs are precluded from placing their DSLAM or line card in the RT. The ILECs must also make available an unbundled broadband loop to facilities-based CLECs collocated in the central office. Finally, the Commission should specifically conclude that ILEC resale of Broadband Service Offerings, such as SBC's service offering, do not satisfy the ILECs' unbundling obligations in an NGDLC network.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of:	)	
	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996	)	

COMMENTS OF
RHYTHMS NETCONNECTIONS INC.

Rule 51.323(b) should be revised to read as follows:

Sec. 51.323 Standards for physical collocation and virtual collocation.

* * *

(b) An incumbent LEC shall permit the collocation of equipment necessary for interconnection or access to unbundled network elements. Equipment is "necessary" so long as it is "directly related to" interconnection and access to unbundled elements and an inability to collocate such equipment would interfere with a CLEC's ability to compete effectively and efficiently. * * * Equipment used for interconnection and access to unbundled network elements includes, but is not limited to:
(1) Transmission equipment including, but not limited to, optical terminating equipment and multiplexers, and
(2) Equipment being collocated to terminate basic transmission facilities pursuant to Secs. 66.1401 and 64.1402 of this chapter as of August 1, 1996.
(3) Digital subscriber line access multiplexers, routers, asynchronous transfer

DISCUSSION

I. THE APPROPRIATE INTERPRETATION OF "NECESSARY" WILL PROVIDE A LIMITING STANDARD TIED TO THE GOALS OF THE ACT

A. The "Necessary" Standard

1. Introduction and Overview

Section 251(c)(6) of the Telecommunications Act of 1996[1] requires incumbent local exchange carriers ("ILECs") "to provide, on rates terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment *necessary* for interconnection or access to unbundled network elements . . . ."[2] Over the tortured history of the implementation of this statutory provision the Commission defined and honed its definition of "necessary" in this context. The Commission's initial determination that "necessary" meant "used and useful" was set forth in the *First Report & Order*,[3] but not appealed.[4] The Commission refined the term's application in the *Advanced Services Order*,[5] which was vacated and remanded by the D.C.

---

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act" or "Act").

[2] 47 U.S.C. § 251(c)(6).

[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 579.

[4] Indeed, ILECs did not object to the Commission articulation of the rule in the *Local Competition Order*. Brief for Petitioners, at 9 n.5, *GTE v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) (No. 99-1176).

[5] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) (*"Advanced Services Order"*).

Circuit on appeal.[6] In this proceeding, the Commission once again requests comment on how this term should be interpreted.[7]

As shown below, the word "necessary" is sufficiently ambiguous to invoke *Chevron* deference by the courts, but in order to be accorded such deference, the statutory term must be interpreted reasonably by the Commission.[8] When ascertaining the "ordinary and fair meaning" of a word susceptible of a broad range of meanings, the Commission should look to the context of the word and ensure that the reading is consistent with other statutory provisions.[9] Further, the courts have made clear not only that a reasonable construction of the term "necessary" must impose "some limiting standard," but also that the Commission must read the statutory terms to effectuate the goals and purposes of the Act.

2. The Commission's Reasonable Interpretations to Further the Statutory Purpose Will be Accorded Deference

Under *Chevron*, the Courts will defer to agency interpretation where the statutory language is ambiguous and the plain meaning of the statute is not discernable.[10] There is wide agreement that the Telecommunications Act is "not a model of clarity"[11] and "any search for 'plain meaning' in the statute is fruitless."[12] Since "Congress is well aware that the ambiguities it

---

[6] 205 F.3d at 424.

[7] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297 (rel. Aug. 10, 2000) ("*Collocation Order on Reconsideration*").

[8] Chevron v. NRDC, 467 U.S. 837, 843 (1984).

[9] *Troy v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997).

[10] 467 U.S. at 863.

[11] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

[12] 205 F.3d at 421.

chooses to produce in a statute will be resolved by the implementing agency,"[13] the Commission is responsible for ensuring that the Congressional purposes are accomplished as the statute is implemented.[14] To be accorded judicial deference, the Commission's interpretation must be "reasonable and consistent with the statutory purpose," and should not "diverge[] from any realistic meaning of the statute."[15]

3. The Commission Should Adopt the Following Standard to Determine When Equipment is Necessary

The Commission should adopt the following standard. In order to fulfill their Section 251(c)(6) obligation to provide physical collocation, ILECs must permit physical collocation of equipment so long as it is "directly related to" interconnection and access to unbundled elements and an inability to collocate such equipment would interfere with a CLEC's ability to compete effectively and efficiently. As detailed below, this definition promotes the goals and purposes of the Act, takes full account of the statutory context in which the term "necessary" appears, and satisfies the specific concerns raised by the D.C. Circuit. Since the rules of statutory construction are satisfied, the courts must accord the agency substantial deference.[16]

4. The Proposed Interpretation of "Necessary" Applies "Some Limiting Standard" on Equipment CLECs Place in the ILEC Premises

The Commission has twice interpreted the term "necessary" as used in the statute. Moreover, the reviewing courts have required that, in order to be accorded deference, the Commission must read "necessary" to apply "*some* limiting standard, rationally related to the

---

[13] 525 U.S. at 397 (*citing* 467 U.S. at 842-43).

[14] 120 F.3d at 285.

[15] *Massachusetts v. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996).

[16] 467 U.S. at 843.

goals of the Act."[17] The definitional standard proposed above clearly imposes "some limiting standard" on the equipment that carriers can collocate in the ILEC premises. CLECs do not have unbridled authority to place any equipment in the ILEC premises. While ILECs are, of course, free to permit collocation of additional equipment, ILECs would only be required to permit CLECs to collocate equipment that would be necessary for competitors to interconnect or access unbundled elements in order to compete effectively and efficiently. Thus, ILECs would not need to permit collocation of equipment such as billing or payroll equipment, whose sole function could be placed elsewhere in the CLECs network without "interfering with" the CLECs' delivery of its services in a way that allows efficient and effective competition.

The D.C. Circuit was clear that it did not mean "to vacate the Collocation Order to the extent that it merely requires LECs to provide collocation of competitors' equipment that is directly related to and thus necessary" to interconnection and access to unbundled network elements ("UNEs").[18] The definition above ensures by its terms that the equipment collocated in the ILEC premises will be "directly related" to interconnection and access to UNEs, and also places further limiting parameters on collocated equipment. Therefore, the definition is a reasonable reading of the statutory term sufficient to satisfy the second prong of the *Chevron* analysis.

5. The Proposed "Necessary" Standard is "Rationally Related to the Goals of the Act"

The Commission must also ensure that the standard is "rationally" and "directly related to" the goals of the Act.[19] Indeed, the proposed definition promotes the Act's fundamental goals

---

[17] 205 F.3d at 423 (*quoting* 525 U.S. at 388) (emphasis in original).

[18] 205 F.3d at 424.

[19] 205 F.3d at 424.

and purposes. The Act's Preamble makes clear that Congress expressly sought to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies."[20] Under Section 706 of the Act, specifically makes the Commission responsible to promoting the advanced services of that section, which provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[21] In Section 256, moreover, Congress requires the Commission to oversee network planning for "the effective and efficient interconnection of public telecommunications networks."[22]

The proposed definition is "reasonable and consistent with"—and indeed promotes—these statutory goals and purposes, without "diverg[ing] from any realistic meaning of the statute."[23] In order to promote the expressly articulated goals of the Act, the Commission must ensure that competitors are permitted to collocate equipment that will enable them to "efficient[ly] and effective[ly] interconnect" and access UNEs.[24] Because the proposed definition involves an inquiry into the effective and efficient use of equipment, it is squarely in line with the type of interconnection Congress sought to promote under Section 256. Finally, because the definition specifically requires ILECs to permit collocation of equipment where a failure to collocate that equipment would interfere with a collocator's ability to compete, the

---

[20] Preamble to Telecommunications Act of 1996.

[21] 47 U.S.C. § 157 nt. (Sec. 706(a)). To affect this purpose, the Commission may utilize "measures that promote competition in the local telecommunications market" or that "remove barriers to infrastructure investment." *Id.*

[22] 47 U.S.C. § 256(b)(1).

[23] *Massachusetts v. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996).

[24] 47 U.S.C. § 256 (b)(1).

standard "promotes competition" and "encourage[s] rapid deployment of new telecommunications technologies." Thus, the definition is fully consistent with the stated "statutory scheme and legislative history."[25]

6. Read in Context, the Proposed Definition of "Necessary" Is Consistent with its "Ordinary and Fair Meaning"

The courts also require the Commission to interpret the statutory term "necessary" in a manner consistent with the "ordinary and fair meaning" of the word.[26] When a word with as many diverse meanings as "necessary" is used in a statute, the courts are clear that it must be read in the context of the goals of the Act.[27] "Necessary" has an "ordinary and fair meaning" that varies with the particular context of its use,[28] and as a result, the courts have long recognized that any definition of the broad term "necessary" must be made with reference to its context.

As the D.C. Circuit recently observed, "identical words may have different meanings where the subject-matter to which the words refer is not the same in the several places where they are used or the conditions are different."[29] "Necessary" need not always import an absolute physical necessity. Rather "it frequently imports no more than that one thing is convenient, or useful."[30] Therefore, the Supreme Court has held that "[i]n ascertaining the sense in which the

---

[25] 205 F.3d at 421 (*citing City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C.Cir.1995)).

[26] "A statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit 'necessary' to that which is required to achieve a desired goal." 205 F.3d at 423; *see also id.* at 424; 525 U.S. at 390.

[27] 205 F.3d at 424.

[28] 323 U.S. at 130.

[29] *US West v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct. 1240 (2000).

[30] *M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819).

word 'necessary' is used . . . we may derive some aid from that with which it is associated."[31] Accordingly, although the Commission must interpret the word "necessary" in a manner consistent with its statutory context, the agency is not bound by its prior construction of the same word in the context of proprietary unbundled network elements.

Applying these principles of statutory construction in this case, the Commission must not reasonably use the most restrictive definition of necessary. In examining the "ordinary and fair meaning" of the statutory use of "necessary," the courts have been clear that "necessary" need not mean "indispensable," "essential," or "vital" where such a reading would be too rigid for a word that should "be harmonized with its context."[32] The context in Section 251(c)(6) requires the Commission to look beyond the most restrictive definition of "necessary," because a restrictive interpretation would undermine the statutory goals and purposes of the Act.

When interpreting "necessary," "a practical judgment" is required.[33] As a result, "necessary" must draw its meaning, as discussed above, from the context and purpose of the 1996 Act, as well as the practical realities and network efficiencies commonly employed by the industry.

---

[31] 17 U.S. at 418; *see also National Railroad Passenger Corporation v. Boston and Maine Corporation*, 503 U.S. 407, 420 (1992). To fulfill requirements for easement of right of way of necessity, the necessity must be actual, real and reasonable, as distinguished from inconvenience, but it need not be absolute and irresistible. *Adams v. Cale*, 137 A.2d 92 (N.J. 1957). When used in relation to power of eminent domain, it does not mean absolute necessity, but only reasonable necessity. *US v. Certain Lands*, Civ. A. No. 8788, (US.D. NJ, Aug. 30, 1956). The necessity of an appurtenance for the beneficial use of leased premises which will entitle the lessee thereto is not an absolute necessity in the sense that it must be completely indispensable but is a real necessity and not a mere convenience or advantage. *Thomas v. U. S.*, 505 F.2d 1282, 1285 (Ct.Cl. 1974).

[32] *Armour & Co. v. Wantock,* 323 U.S. 126, 129-30 (1944). Thus, courts may reject the term "necessary" as meaning only "indispensable," which—as the D.C. Circuit recognized—is categorically encompassed within the term "necessary." However, the D.C. Circuit requires that "[a]nything beyond this, however, demands a better explanation from the FCC." 205 F.3d at 424.

[33] 323 U.S. at 130.

7. The Proposed "Necessary" Standard is Consistent with the Remainder of the Language in the Section 251(c)(6)

The proposed interpretation of "necessary" harmonizes with the remaining text in Section 251(c)(6) and the related statutory provisions on interconnection and access to UNEs. The proposed interpretation of "necessary" ensures that CLECs are able to collocate interconnection equipment that they need to compete efficiently and effectively, and is therefore consistent with an ILEC's Section 251(c)(2) obligation to provide interconnection that is "at least equal in quality to that provided by the LEC to itself or any subsidiary, affiliate."[34]

Sections 251(c)(6), 251(c)(2) and 251(c)(3) all require ILECs to adhere to terms and conditions that are just, reasonable and nondiscriminatory for collocation, interconnection and access to UNEs.[35] The terms and conditions of that access cannot favor the ILEC, its affiliates or other parties. Thus, rules that would result in substantial inequities between the CLEC and the ILEC cannot be just, reasonable and nondiscriminatory and therefore must be rejected. A reasonable construction of the term "necessary" must ensure that CLECs have the ability to interconnect and access UNEs in a manner that effectuates the interconnection and access to UNEs. Only by avoiding the strictest definition of "necessary" can the Commission establish a rule that meets "reasonableness" requirement set forth in Section 251(c)(6).

8. Industry Practice Provides a Benchmark for Determining "Necessary" Equipment

In order for the terms and conditions of collocation to be just and reasonable, let alone nondiscriminatory, the Commission should look to industry practices as a benchmark. The Commission can undertake a technical inquiry into practices in the telecommunications industry

---

[34] 47 U.S.C. § 251(c)(2).

[35] *See id.*; 47 U.S.C.§ 251(c)(3); 47 U.S.C. § 251(c)(6).

to ensure that definitional restrictions on collocation are reasonable and consistent within the purposes of the statute. Interpreting the collocation obligation as Rhythms proposes, the Commission would begin by looking to standard industry practices, including those of the LEC, its subsidiaries, affiliates or other competitors.

Any determination as to whether particular equipment is "necessary" would take into account how industry providers generally construct their networks in order to optimize network efficiency to compete effectively. Thus, if an interconnection or UNE access function is performed by a multi-functional piece of equipment in the industry, then CLECs can collocate that equipment. This inquiry contemplates an understanding of standard industry practices and procedures for the arrangement and placement of equipment actually available for the purposes for which collocation is required, as well as a recognition that the equipment should be efficient, practical, operational, and economically sustainable. Such an inquiry provides the Commission with a wealth of useful benchmark data against which to ascertain what equipment the industry has historically considered to be necessary for interconnection and access to specific network elements, features, functions and capabilities.

B. The Commission Should Not Attempt to List "Unnecessary" Equipment.

The Commission's request for a list of "unnecessary" equipment is infeasible.[36] As a practical matter, such a list is unlikely to be comprehensive, as it involves "proving a negative." Such a "list" of banned equipment contemplates the ability to anticipate and list how any piece of equipment will be used. As discussed in more detail below, with the ever changing nature of the network, constant evolution and consolidation of equipment to increase functionality and

[36] *2nd NPRM* ¶ 79.

efficiency, and the burgeoning service innovations offered by providers, it is impossible to construct a comprehensive or static list of equipment necessary for interconnection and access to UNEs. Crafting a definition of "necessary", as proposed above, will provide ample flexibility to both ensure that the CLECs have the ability to respond to these changing conditions and that collocated equipment is appropriately limited as required by the Act.

That said, however, it is clear that ILECs have no obligation to permit collocation of equipment that performs no function "necessary" for interconnection or UNE access as those terms are properly understood. In order to prevent rampant inefficiency, CLECs should be permitted, under the above-articulated standard, to collocate equipment that has a necessary functionality. Consistent with the goals and purposes of the Act, such equipment should not be barred simply because, in addition to providing a necessary functionality, the equipment also performs other incidental functions.

C. Properly Interpreted, the Necessary Standard Gives Competitors' the Opportunity to Compete Contemplated by the Act Without Effecting an Unnecessary Taking of LEC Property

The standard proposed by Rhythms ties the equipment necessary for collocation to what is needed to compete efficiently and effectively. The proposed "necessary standard" will look at the functions "directly related to" interconnection or UNE access that CLECs need to collocate in order to effectively and efficiently compete. CLECs could then select from the available equipment that performs these functions and ILECs would be required to permit CLECs to collocate that equipment. Thus, CLECs will not be unreasonably constrained to collocating interconnection and UNE access equipment that does not exist, is not efficient or would effectively limit their ability to compete.

In contrast, a strict reading of the term necessary, one that equates the term to "indispensable", could seriously damage competitors' ability to compete. Equipment limited to "necessary" functionality may not even exist.[37] If it does exist, it may be antiquated, cumbersome or evenlarger than more efficiently designed multi-use models.[38] Properly interpreted, the necessary standard will result in collocation of only that equipment contemplated within the scope and purpose of the Act.

II. THE APPROPRIATE INTERPRETATION OF "NECESSARY" WILL PERMIT COLLOCATION OF EQUIPMENT DIRECTLY RELATED TO INTERCONNECTION OR UNE ACCESS SO AS TO EFFECTUATE THE GOALS OF THE ACT

As discussed in the following sections and the supporting affidavit, multi-use equipment and digital loop carrier line cards are equipment necessary for interconnection and access to unbundled elements and thus CLECs should be permitted to collocate this equipment on the ILEC premises. Furthermore, as demonstrated below, the equipment that Rhythms collocates at ILEC premises is "necessary" for interconnection and access to UNEs. Therefore, the Commission should implement rules that expressly provide for collocation of multi-use equipment, DLC line cards as well as ensure that CLECs, including Rhythms, can continue to collocate the equipment necessary to efficiently and effectively provide advanced services to American consumers.

A. CLECs Must Be Permitted to Collocate Multi-use Equipment That Performs "Necessary" Functions

For the Commission to properly implement the previously articulated standard, its inquiry must focus first on the functions that CLECs must have at the ILEC premises for interconnection

---

[37] Joint Declaration at 17.

[38] Joint Declaration at 17.

and access to unbundled network elements.[39] Applying the proposed standard, a function is "necessary" if it is "directly related to" interconnection and access to unbundled elements and if not having that function would interfere with a CLEC's ability to compete effectively and efficiently. Once the functionality is determined to be necessary for interconnection and UNE access, then CLECs must be permitted to collocate equipment that provides that functionality.

After it is established that a CLEC can collocate a particular functionality under the "necessary" standard, the CLEC must be able to purchase equipment to perform the necessary function from among actual currently available equipment and then collocate that equipment at the ILEC premises. There may be multiple vendors to choose among or several equipment configurations that include among their capabilities the "necessary" function. Various types of equipment may perform the "necessary" function differently. Some choices may have a favorable price point or performance-price trade-off that meets the CLEC's needs. The CLEC must retain the ability to select the equipment that suits its business objectives. Thus, if equipment performs a function determined to be "necessary", then ILECs must permit CLECs to collocate its choice of equipment to perform that function on the ILEC premises.

Now and increasingly over time, there is strong likelihood that available equipment that performs "necessary" functions with also perform other functions. The equipment market is evolving to increasingly develop multifunction equipment for reasons of cost and efficiency. In practice, competitors and incumbents alike continually strive to deploy and update network

[39] Indeed, such a functional inquiry is what drove the D.C. Circuit's analysis and led the court to conclude that because CLEC billing and payroll functions do not need to be performed at the ILEC premises, billing equipment should not be collocated. 205 F.3d at424.

equipment to maximize efficiency, combine functions and lower costs.[40] Manufacturers are asked to enhance equipment to include additional features and capabilities that will increase overall efficiency or consolidate functions previously performed by multiple pieces of equipment. By integrating multiple functions into newer model equipment, manufacturers are condensing the overall space required for collocation, while at the same time increasing the capacity of the equipment to enable providers to serve a larger customer base from equipment that takes up the same amount of space.[41] For this reason, older equipment with fewer functions may well require the same, if not more, space than its more efficient multi-functioned counterparts.[42]

Moreover, there is a substantial benefit to the public when state-of-the art equipment is deployed and utilized by carriers. A primary focus of these innovations is to increase the efficiencies gained by combining functions into compact pieces of equipment at lower overall cost. Newer, state-of-the-art equipment reduces the overall costs of provisioning service, or increases the performance of the service, all of which benefits consumers.[43] Additionally, as competitors acquire this state-of-the art equipment, their competition, including incumbents, must respond, often by updating their equipment to keep in line with these pro-competitive efforts. Likewise, if incumbents deploy state-of-the-art equipment, then the market will demand these efficiencies of competitors.[44] The competitive response may be to lower customer prices,

---

[40] Joint Declaration ¶¶ 10-18; *On or Off the Bandwidth Bandwagon*, Washington Post (Sept. 24, 2000); *Packet Voice Catches Fire*, Xchange: Information and Analysis on the Emerging Competitive Local Exchange at 66 (Sept. 2000).

[41] Joint Declaration ¶¶ 17-18.

[42] Joint Declaration ¶ 17.

[43] Joint Declaration ¶¶ 10, 15-16, 18.

[44] Joint Declaration ¶¶ 15-17.

to seek additional capabilities in the next generation of equipment or to otherwise provide additional consumer benefits that will allow the carrier to remain competitive. Thus, consumers will derive benefits if the natural and efficient market result—in which all competitors can deploy and fully utilize the most efficient equipment of their choosing—is allowed to take its course.

The Commission requested comment on the impact of deploying equipment at ILEC premises that performs only a single interconnection or UNE access function.[45] Given the drive of the marketplace toward multifunctional equipment, there are three undesirable approaches to limiting its deployment in ILEC premises. The first option would be to refuse to permit either ILECs or CLECs to place multifunctional equipment in the ILEC premises in order to assure nondiscriminatory treatment. Requiring all carriers to use sub-optimal inefficient equipment would force both competitors and incumbents to assemble less efficient networks. As a result, under this rule, all consumers suffer, because no provider would be offering services that use the most effective and efficient technology or equipment. Consumers would not receive the benefits of lower costs or higher performance that multifunctional equipment provides.

A second option would be to allow ILECs to use multifunctional equipment in their premises, but refuse to permit CLECs to collocate equipment that has "non-necessary" functions. In this case, consumers served by CLECs' customers would be disadvantaged relative to customers of the incumbent. As in the first option, CLEC customers would be served using inefficient technology at higher cost. Such older, out-dated equipment is less efficient and more expensive to maintain and service, than the smaller, cheaper multi-use equipment the ILECs

---

[45] *2nd NPRM*, ¶ 74.

would be permitted to use.[46] Not only does this approach raise serious issues of comparative inefficiency, it causes anticompetitive effects and violate the Act's ban on discrimination. Allowing incumbents to deploy state-of-the art equipment, while refusing to collocate such equipment for CLECs is precisely the type of discriminatory, unreasonable restriction on collocators that the statutory language expressly prohibits.[47]

Under the final option, both ILECs and CLECs would be able to place multifunctional equipment in the ILEC premises, but CLECs would be required to disable the "non-necessary" functionalities of the equipment. While this approach provides a superficial solution, it cannot withstand closer examination. This solution suffers from two fatal assumptions. Requiring CLECs to disable functionalities of their equipment appears to suggest that CLECs would be able to purchase existing equipment without a need to custom design the equipment at a substantial cost increase, and also assumes that in purchasing its multi-function equipment CLECs would achieve the same cost economies as ILECs receive. In fact neither of these assumptions is valid.

When a CLEC buys the same multifunction equipment as the ILEC, but is permitted to use only one function, in effect the CLEC pays significantly more for the function it uses than the ILECs pays for the same function. In addition, the CLEC must purchase duplicate equipment to perform the disabled functionalities and locate it elsewhere. The ILEC has no corresponding cost. As a result, the CLEC's total expenditure for the same set of functions is clearly much higher than the ILEC's costs. For instance, if a piece of equipment costs X and performs functions A and B, then under this approach the ILEC pays X just to obtain functions A and B.

---

[46] Joint Declaration ¶ 17.

[47] 47 U.S.C. § 251(c)(6).

In contrast, a CLEC also pays X to obtain function A and B, but must disable function B. In order to use function B, the CLEC must purchase duplicative equipment with function B at a cost of X. The CLEC thus pays at least 2X to obtain functions A and B. As with the other options discussed above, if ILECs must disable functions on collocated multi-use equipment, consumers will not receive the benefits of lower prices, and CLECs will be the victims of anticompetitive discrimination that violates the statute and the Commission's rules.

Thus, in response to the Commission's inquiry, it is clear that permitting collocation of only single-function equipment would not serve the public interest. Consumers would be the biggest losers because they would be unable to realize benefits of lower costs or higher performance that multifunctional equipment provides. Further, such a policy would distort or disrupt the normal industry tendency to consolidate and streamline equipment to increase efficiency and efficacy. Perversely, the rule would force *in*efficiencies by calling upon manufacturers to build, and competitors to buy, equipment capable of performing solely "necessary" tasks. Similarly, requiring competitors to disable certain functions of multi-functional equipment undermines efficiency with *no* corresponding benefit, and may also adversely effect the operational capabilities or efficiencies of the remaining functionalities.[48]

In contrast, permitting collocation of multi-use equipment serves the public interest and furthers the statutory goals and purposes. Congress expressly sought to foster efficient and effective interconnection and access to UNEs.[49] Conversely, there is no evidence that Congress in any way intended new competitors to be forced to underutilize the functionalities of their collocated equipment.

---

[48] Joint Declaration ¶ 17.

[49] *See* 47 U.S.C. § 256(b).